



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 21, 2004

Mr. Geoffrey I. Barr  
Assistant Criminal District Attorney  
Comal County Criminal District Attorney's Office  
150 N. Seguin, Suite 307  
New Braunfels, Texas 78130

OR2004-8057

Dear Mr. Barr:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 209662.

The Comal County Sheriff's Office (the "sheriff") received a request for information pertaining to a specified incident, including a 9-1-1 audio recording, or the transcript thereof, and a photograph of the officer involved in the incident. You claim that portions of the requested information are excepted from disclosure under sections 552.108 and 552.119 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that, to the extent any other responsive information exists, it has been released to the requestor. If not, you must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

We next note that you have not fully complied with section 552.301 of the Government Code. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed

statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office a copy of the written request for information or a copy of the requested photograph.<sup>1</sup>

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Normally, a compelling reason for non-disclosure exists where some other source of law makes the information confidential or where third party interests are at stake. Open Records Decision No. 150 at 2 (1977). Section 552.108 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Gov't Code § 552.007*; Open records Decision Nos. 663 at 5 (1999) (untimely request for decision resulted in waiver of discretionary exceptions), 177 (1977) (statutory predecessor to Gov't Code § 552.108 subject to waiver). The sheriff's claim under section 552.108 does not present a compelling reason for nondisclosure for purposes of section 552.302. *See Open Records Decision Nos. 630 at 3 (1994), 325 at 2 (1982).*

However, the need of another governmental body to withhold information under section 552.108 can provide a compelling reason under section 552.302. *See Open Records Decision No. 586 at 3 (1991).* Because the Comal County Criminal District Attorney's Office (the "district attorney") objects to the release of the information at issue, we will consider the applicability of section 552.108.

Section 552.108(a)(1) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]" A governmental body that raises section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. *See Gov't Code § 552.301(e)(1)(A); Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

The district attorney states that this case is in the early stages of investigation. Further, the district attorney states that disclosure of the submitted audiotape would interfere in any future

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<sup>1</sup>We note that this office's description of the request is based on the sheriff's representations regarding its contents.

prosecution related to this incident and asks that none of the requested information be released during the pendency of the investigation and prosecution. Thus, the sheriff may withhold the requested audiotape under section 552.108.

The sheriff and the district attorney also raise section 552.119 of the Government Code for the photograph of the officer involved in the incident. A claim under this section can provide a compelling reason for nondisclosure under section 552.302. However, the sheriff has not submitted the requested photograph, and thus we have no basis for concluding that there is any compelling reason to withhold it under section 552.119. Therefore, we have no choice but to order the requested photograph released under section 552.302.

In summary, the requested audiotape may be withheld under section 552.108 of the Government Code. All remaining requested information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in dark ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace  
Assistant Attorney General  
Open Records Division

ECG/jev

Ref: ID# 209662

Enc. Submitted documents

c: Mr. Ron Maloney  
Staff Writer  
Herald-Zeitung  
707 Landa Street  
New Braunfels, Texas 78130  
(w/o enclosures)